IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0098
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DAWN MICHELE WEAR,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051038

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 Appellant Dawn Wear was charged with first-degree murder in the death of a woman with whom Wear's husband was having an affair. Wear's defense was that she had

intended to commit suicide in front of her husband and the woman, but the shotgun had fired accidentally. The jury found Wear guilty of the lesser-included offense of second-degree murder, and the trial court sentenced her to the presumptive prison term of sixteen years. She raises a single issue on appeal, claiming the trial court erred in denying her motion in limine to preclude the admission of a statement Wear had made to a family friend several months before the murder. We find no error and affirm.

¶2 On the first day of trial, after both parties had already given their opening statements, Wear filed a motion in limine seeking to preclude a witness, Dustin Jones, from testifying about the statements Wear had made to him six or seven months before the murder. As she put it in her motion, Jones told the police Wear had said she would hurt or kill any woman with whom her husband had an affair. She also wrote, however, that Jones had said it was a "joking conversation." Wear argued the statement was inadmissible under Rule 403, Ariz. R. Evid., 17A A.R.S., to show her state of mind toward the victim because it was a threat to "an unnamed and possibly nonexistent third party," and there was an insufficient connection between the threat and the killing. And, because the statement was made long before Wear even learned about her husband's affair with the victim, Wear contended its probative value was outweighed by its clearly prejudicial effect.

¶3 Despite the state's assertion that the motion was untimely, having been filed twenty-four days after the deadline for filing motions, the trial court addressed the motion

on its merits. The court ruled Jones's statement "ha[d] probative value that [wa]s not outweighed by any unfair prejudice or confusion."

¶4 On appeal, Wear argues the trial court committed reversible error in admitting Jones's testimony about her prior statement. We review the court's ruling for a clear abuse of discretion. *See State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997). Wear acknowledges three cases in which similar statements were held to have been properly admitted but attempts to distinguish them based on Jones's testimony at trial that Wear had instead told him she would "go get them or beat him up" if she ever found her husband cheating on her with another woman, an argument she never made below. We find the cases indistinguishable.

¶5 In *State v. Dickey*, 125 Ariz. 163, 167, 608 P.2d 302, 306 (1980), the defendant had previously said, "If anybody ever messes with me, I'll blow them away." Our supreme court held the statement was properly admitted because it pertained to circumstances similar to those surrounding the shooting for which he was on trial and showed his state of mind and his reflection about the shooting. *Id.* The court found the lack of reference "to a specific person or class" did not by itself render the statement irrelevant or inadmissible. *Id.*

¶6 The same was true in *State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977). The defendant's statement several hours before he shot and killed his wife "that some man was fooling around with his wife and that if he found out who it was, he would kill him" was

held to have been properly admitted. *Id.* at 266-67, 569 P.2d at 208-09. Noting "[t]he test to be applied . . . is whether there was a reasonable and sufficient connection between the threat to the third person and the killing," the supreme court found the statement was probative of the defendant's mental state and material to the issues of intent and premeditation. *Id.*

¶7 In the third case, the supreme court held evidence about the defendant's prior threats to kill any game warden who caught him butchering a poached deer had been properly admitted despite the claim they were too remote in time. *State v. Moore*, 111 Ariz. 355, 355-56, 529 P.2d 1172, 1172-73 (1974). One statement had been made about eighteen months before the defendant killed the victim, another about a year before, and the third about a month before. *Id.* at 356, 529 P.2d at 1173. The supreme court noted the length of time between the statements and the killing was not a matter of admissibility but a factor for the jury to consider. *Id.* And it held the statements were properly admitted "as evidence of the continuing malicious state of mind of the defendant." *Id.*

¶8 Despite Wear's assertions, we are unable to meaningfully distinguish her situation from the above cases. Although Jones testified Wear had said she would "go get them or beat him up," a statement that does not necessarily reflect an intent to kill anyone, Jones also conceded he had told the police several months previously that Wear had said she would "kick [the woman's] ass or would kill her," precisely the type of threat held admissible in the above cases. In fact, Jones testified the statement was "new" and "fresh

in [his] mind" when he told the police about it. And, although Jones testified he had considered the statement had been made in jest, he acknowledged he had told the police Wear had looked him straight in the eye without even blinking when she made the threat. He also testified he had considered her look to be "serious," suggesting that her husband should assume, "[D]on't do it[. D]on't even think about it." Jones's own contradictory testimony about the seriousness of Wear's statements, therefore, was an issue for the jury to resolve. *See id.*

¶9 Although Wear argues the evidence in question was "highly damaging" to her case, "Rule 403 weighing is best left to the trial court and, absent an abuse of discretion, will not be disturbed on appeal." *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993). We find no such abuse here.

¶10 That others testified Wear was peaceful and nonviolent despite the statement she had made to Jones is not sufficient to render its admission "unfair[ly] prejudicial." Ariz. R. Evid. 403. "Unfair prejudice 'means an undue tendency to suggest decision on an improper basis,' Fed. R. Evid. 403, Advisory Committee Note, such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). Wear has not claimed any such suggestion existed in this case but simply asserts the state "relied heavily on this statement to prove its case." Because Wear did not file her motion in limine until after the prosecutor had given his opening statement, she cannot claim any error in his reference to Jones's testimony during that statement. *See State v. Rodriguez*, 126 Ariz. 28,

30, 612 P.2d 484, 486 (1980) (motion in limine treated as motion to suppress and must comply with time limits of Rule 16.1, Ariz. R. Crim. P.). Although the prosecutor also referred in his closing argument to Wear's prior statement to Jones, that reference was made in an unsuccessful attempt to establish premeditation and, in any event, does not necessarily establish that unfair prejudice substantially outweighed the probative value of the evidence.

¶11 We do not address Wear's argument that the evidence was admitted in violation of Rule 404(b), Ariz. R. Evid., 17A A.R.S. As the state points out, and as Wear acknowledges in her reply brief, she did not raise the issue below. We disagree with Wear that the state's brief mention of that rule in opposing the motion in limine served to preserve the issue for appeal. Wear did not respond to the state's argument, the rule was not mentioned again, and the trial court clearly relied only on Rule 403, Ariz. R. Evid., in ruling the statement was admissible. And Wear does not argue the trial court fundamentally erred in admitting Jones's testimony in violation of Rule 404(b).

¶12 Having found no abuse of the trial court's discretion in admitting the statement, *see Jones*, 188 Ariz. at 394, 937 P.2d at 316, we affirm Wear's conviction and sentence.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge